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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO PEREZ, Defendant and Appellant.	B298897 (Los Angeles County Super. Ct. No. TA112332)

APPEAL from an order of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed.

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters and Susan Sullivan Pithey, Assistant Attorneys General, Idan Ivri and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

In 2011, a jury convicted petitioner and appellant Antonio Perez of five counts of attempted premeditated murder, along with other offenses. In 2019, after passage of Senate Bill No. 1437 (Senate Bill 1437), Perez petitioned for resentencing on his attempted murder convictions pursuant to Penal Code section 1170.95.[1] Finding Perez statutorily ineligible for relief, the trial court summarily denied his petition. Perez contends that the trial court's summary denial, prior to the appointment of counsel, contravened the requirements of section 1170.95 and violated his constitutional rights to counsel and due process. We disagree, and affirm the court's order.

PROCEDURAL BACKGROUND[2]

A jury convicted Perez of five counts of attempted premeditated murder arising out of shootings committed on different dates in April 2010. The jury additionally convicted Perez of assault with a firearm, shooting at an occupied vehicle, and possession of a firearm by a felon, with firearm and criminal street gang enhancements. The trial court sentenced Perez to 231 years to life in prison. We affirmed Perez's convictions in an unpublished opinion issued in January 2014. (*People v. Perez* (Jan. 14, 2014, B238303.)[3]

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[1] All further undesignated statutory references are to the Penal Code.

[2] Because the facts underlying Perez's convictions are not relevant to our resolution of the issues presented on appeal, we do not detail them here.

[3] We take judicial notice of our unpublished opinion. (Evid. Code, §§ 452, subd. (d), 459.)

On May 17, 2019, Perez filed a petition for resentencing pursuant to section 1170.95. Using a preprinted form, he checked boxes stating that he had been convicted of first or second degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine, but handwrote in the margin that he had been convicted of attempted murder. He also checked a box stating, "I request that this court appoint counsel for me during this re-sentencing process."

On May 21, 2019, the trial court denied the petition. Perez was not present and was not represented by counsel. The court's minute order stated, "The petitioner was convicted of 5 counts of attempted, willful, deliberate and premeditated murder. The statute only applies to individuals convicted of first or second degree murder. Petitioner does not qualify for resentencing under Penal Code section 1170.95."

Perez timely appealed.

DISCUSSION

Perez contends that the trial court's summary denial of his petition, without appointing counsel and considering briefing, contravened the requirements of section 1170.95, violated his constitutional rights to counsel and due process, and amounted to structural error requiring reversal. We disagree. The trial court's summary denial was proper because Perez is ineligible for relief under section 1170.95 as a matter of law.

1. *Senate Bill 1437*

Senate Bill 1437, which took effect on January 1, 2019, was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a

major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f); *People v. Munoz* (2019) 39 Cal.App.5th 738, 749, review granted Nov. 26, 2019, S258234 (*Munoz*).) "Senate Bill No. 1437 achieves these goals by amending section 188 to require that a principal act with express or implied malice and by amending section 189 to state that a person can only be liable for felony murder if (1) the 'person was the actual killer'; (2) the person was an aider or abettor in the commission of murder in the first degree; or (3) the 'person was a major participant in the underl[y]ing felony and acted with reckless indifference to human life.' (§ 189, subd. (e), as amended by Stats. 2018, ch. 1015, §§ 2, 3.)" (*People v. Cornelius* (2020) 44 Cal.App.5th 54, 57, review granted Mar. 18, 2020, S260410; *People v. Tarkington* (2020) 49 Cal.App.5th 892, 896 (*Tarkington*); *People v. Verdugo* (2020) 44 Cal.App.5th 320, 325–326, review granted Mar. 18, 2020, S260493 (*Verdugo*).)

Senate Bill 1437 also added section 1170.95, which permits persons convicted of murder under a felony murder or natural and probable consequences theory to petition in the sentencing court for vacation of their convictions and resentencing. Section 1170.95 provides in pertinent part: "A person convicted of felony murder or murder under a natural and probable consequences theory" may file a petition "when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner

could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a).)

2. *Perez is statutorily ineligible for relief as a matter of law because he was not convicted of murder*

We and other appellate courts have held that, by its plain terms, Senate Bill 1437 does not encompass attempted murder. (*Munoz*, *supra*, 39 Cal.App.5th at p. 753, rev.gr.; *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103–1105, review granted Nov. 13, 2019, S258175 (*Lopez*); *People v. Dennis* (2020) 47 Cal.App.5th 838, 844.) Our California Supreme Court is currently considering the question. (*Lopez*, S258175.) Pending further guidance from our Supreme Court, we continue to conclude that section 1170.95 provides relief only for persons convicted of murder, not attempted murder.

When interpreting a statute, we begin by examining the statute's words, giving them their usual and ordinary meaning. (*People v. Colbert* (2019) 6 Cal.5th 596, 603; *People v. Ruiz* (2018) 4 Cal.5th 1100, 1105–1106.) If not ambiguous, the plain meaning controls. (*Colbert*, at p. 603; *Ruiz*, at p. 1106.) The plain language of section 1170.95 speaks *only* in terms of murder, not attempted murder. "Subdivision (a) of . . . section 1170.95 states that a 'person convicted of *felony murder or murder under a natural and probable consequences theory*' may petition to have his or her '*murder conviction* vacated' and for resentencing. (Italics added.) To establish entitlement to relief, the petitioner must show he or she was charged with *murder*; was convicted of *first degree or second degree murder*; and could not have been convicted of *first or second degree murder* due to changes

to section 188 or 189 wrought by Senate Bill 1437. (§ 1170.95, subd. (a).) The remainder of section 1170.95 likewise speaks only in terms of murder, not attempted murder." (*Munoz*, *supra*, 39 Cal.App.5th at p. 754, rev.gr.) The unambiguous statutory language thus compels the conclusion that the offense of attempted murder is excluded from section 1170.95's ambit. (*Ibid.*; *Lopez, supra*, 38 Cal.App.5th at pp. 1103–1105, rev.gr.; *People v. Dennis*, *supra*, 47 Cal.App.5th at pp. 841 [Senate Bill 1437 "reaches the crime of murder but has no application to attempted murder"]; *People v. Larios* (2019) 42 Cal.App.5th 956, 961, 969–970, review granted Feb. 26, 2020, S259983 [§ 1170.95 applies only to murder convictions and excludes attempted murder convictions]; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1008, review granted Mar. 11, 2020, S259948 ["we agree with *Lopez* and *Munoz* that the petitioning procedure added in section 1170.95 does not apply to attempted murder"];[4] cf. *People v. Flores* (2020) 44 Cal.App.5th 985, 993 [section 1170.95 is inapplicable to voluntary manslaughter convictions; "[t]hrough its repeated and exclusive references to murder, the

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[4] In contrast to *Lopez* and *Munoz, Medrano* and *Larios* concluded that Senate Bill 1437 abrogated the natural and probable consequences doctrine as to both murder *and* attempted murder. (*People v. Medrano*, *supra*, 42 Cal.App.5th at p. 1015, rev.gr.; *People v. Larios*, *supra*, 42 Cal.App.5th at p. 968, rev.gr.) *Medrano* further held that, as to nonfinal attempted murder convictions, Senate Bill 1437 applies retroactively on direct appeal. (*Medrano*, at pp. 1018–1019.) But even if *Medrano* and *Larios* are correct on these points, they are of no help to Perez; both cases clearly hold that section 1170.95 relief is unavailable to a defendant convicted of attempted murder.

plain language of section 1170.95 limits relief only to qualifying persons who were convicted of murder"].)

Perez makes a variety of arguments aimed at sidestepping the import of this statutory language, but none are persuasive. First, he argues that Senate Bill 1437's failure to mention attempted murder is of no consequence because section 664 (which sets forth the punishment for attempted crimes), references section 189 (which defines degrees of murder), and section 189 was amended by Senate Bill 1437. He asserts: "Since section 664 already refers to section 189, which was amended by [Senate Bill 1437], and which sets forth an exception to the malice requirement in amended section 188, [Senate Bill] 1437 did not need to specifically refer to its application to attempted murder." We do not follow this convoluted logic. Section 664 states that a person convicted of attempted willful, deliberate, and premeditated murder, "as defined in Section 189," shall be punished by life with the possibility of parole. Senate Bill 1437 did not somehow incorporate attempted murder into its scope simply because section 664 prescribes the punishment for attempted murder.

Perez also asserts that, because Senate Bill 1437 "altered the law of murder," it also "altered the law of attempted murder," and the amendments therefore apply to his crimes. In his view, the correct focus of our inquiry should be the "substantive issue of whether changes to sections 188 and 189 eliminate[d] the natural and probable consequences . . . doctrine as a valid theory of accomplice liability for attempted murder." But Perez's judgment is final. The amendments to sections 188 and 189—even if construed to prohibit use of the natural and probable consequences doctrine to prove guilt in an attempted murder

case—do not retroactively apply to him. (See *People v. Larios*, *supra*, 42 Cal.App.5th at p. 970 [defendant was "categorically excluded from seeking relief through the section 1170.95 petitioning procedure for his attempted murder convictions, which have long been final"], rev.gr.) Thus, even if Senate Bill 1437 precludes application of the natural and probable consequences doctrine in an attempted murder case, this circumstance has no bearing on the relief offered by section 1170.95, which is expressly limited to murder.

Next, Perez asserts that attempted murder is a lesser included offense of murder, and remedial legislation impliedly includes attempts to commit the same crime. It is not clear that attempted murder is, in fact, a lesser, necessarily included offense of murder. (See *People v. Bailey* (2012) 54 Cal.4th 740, 753 [the principle that attempt is a lesser included offense of any completed crime is "not applicable" where "the attempted offense includes a particularized intent that goes beyond what is required by the completed offense"]; *People v. Fontenot* (2019) 8 Cal.5th 57, 72.)

But even assuming attempted murder is a lesser included offense of murder, this does not explain away the fact that section 1170.95 expressly limits relief to persons convicted of *murder*. Perez cites no persuasive authority for the proposition that we must read "attempted murder" into section 1170.95 where the Legislature has plainly omitted it. When the Legislature wishes a statute to encompass both a completed crime and an attempt, it knows how to say so. (*Munoz*, *supra*, 39 Cal.App.5th at p. 757, rev.gr.; see, e.g., §§ 12022.53, subd. (a)(18), 12022, subd. (a)(1), 667.5, subd. (c)(12), 1192.7, subd. (c)(22), (39).) We are not at liberty to add to the statute what the Legislature has omitted.

(*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545; *Munoz*, at pp. 755–756.) *People v. King* (1993) 5 Cal.4th 59 and *People v. Barrajas* (1998) 62 Cal.App.4th 926, cited by Perez, do not assist him for the reasons we explained at length in *Munoz*. (*Munoz*, at pp. 758–759; *Lopez*, *supra*, 38 Cal.App.5th at pp. 1106–1107, rev.gr.)

Nor does interpreting section 1170.95 to limit relief to persons convicted of murder lead to absurd results. In *Munoz*, in regard to application of Senate Bill 1437 as a whole, we considered this contention at length and rejected it. (*Munoz*, *supra*, 39 Cal.App.5th at pp. 756–760, rev.gr.) That same analysis applies here. In a nutshell, it is not clear that interpreting section 1170.95 to apply to convictions for murder, but not attempted murder, will always, or typically, result in longer sentences for the latter. (*Munoz*, at pp. 757–758.) Excluding attempted murder from the statute's reach does not undermine the Legislature's goal of making punishment commensurate with culpability, because the punishment for attempted murder was already, prior to Senate Bill 1437's enactment, less than that imposed for murder. (*Id.* at p. 758.) Even if some attempted murderers are subject to longer sentences than some murderers who obtain relief under section 1170.95, this fact is insufficient to trigger application of the absurdity exception. (*Munoz*, at p. 758.) And, contrary to Perez's argument, it is clear that the Legislature intended to exclude persons convicted of attempted murder from the statute's reach. (*Id.* at p. 757.)

Finally, there is no merit to Perez's contention that construing section 1170.95 to exclude attempted murder violates equal protection principles. In *Lopez*, our colleagues in Division

Seven considered and rejected the contention that construing Senate Bill 1437 to encompass only murder violated equal protection principles; we came to the same conclusion in *Munoz*. (*Lopez*, *supra*, 38 Cal.App.5th at pp. 1107–1112, rev.gr.; *Munoz*, *supra*, 39 Cal.App.5th at pp. 760–768, rev.gr.) The analyses in those cases apply equally here. Persons convicted of attempted murder under the natural and probable consequences doctrine are not similarly situated to persons convicted of murder, and the Legislature had a rational basis for excluding attempted murder from the law's scope. (*Lopez*, at pp. 1109–1113; *Munoz,* at pp. 760–768.)

3. *Because Perez is statutorily ineligible, the trial court did not err by denying his petition before appointing counsel or considering briefing*

We turn to Perez's contention that the trial court's denial of his petition, without the appointment of counsel and the opportunity for briefing, violated the mandates of section 1170.95, as well as his Sixth Amendment and due process rights.

Agreeing with *Verdugo*, we recently held that evaluation of a section 1170.95 petition requires a multi-step process: an initial review to determine the petition's facial sufficiency; a prebriefing, "first prima facie review" to preliminarily determine whether the petitioner is statutorily eligible for relief as a matter of law; and a second, postbriefing prima facie review to determine whether the petitioner has made a prima facie case that he or she is entitled to relief. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 897; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 327–330, rev.gr.; *People v. Torres* (2020) 46 Cal.App.5th 1168, 1177–1178, review granted June 24, 2020, S262011; *People v. Drayton* (2020) 47 Cal.App.5th 965, 975–976.)

When conducting the first prima facie review, the court must determine, based upon its review of readily ascertainable information in the record of conviction and the court file, whether the petitioner is statutorily eligible for relief as a matter of law, i.e., whether he or she was convicted of a qualifying crime, based on a charging document that permitted the prosecution to proceed under the natural and probable consequences doctrine or a felony murder theory. (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 897–898; *Verdugo*, *supra,* 44 Cal.App.5th at pp. 329–330, rev.gr.) If it is clear from the record of conviction that the petitioner cannot establish eligibility as a matter of law, the trial court may deny the petition without appointing counsel. (*Tarkington*, at p. 898; *People v. Torres*, *supra*, 46 Cal.App.5th at p. 1178, rev.gr; *Verdugo*, at pp. 330, 332–333; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1139–1140, review granted Mar. 18, 2020, S260598; *People v. Cornelius*, *supra*, 44 Cal.App.5th at p. 58, rev.gr.)[5] If, however, the petitioner's eligibility is not established as a matter of law, the court must appoint counsel and permit briefing to determine whether the petitioner has made a prima facie showing he or she is entitled to relief. (*Verdugo*, at p. 330; *Tarkington*, at p. 898.)

Here, it is undisputed that Perez was convicted of attempted murder; he so stated in his petition, under penalty of perjury. As we have explained, section 1170.95 does not provide

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[5] Our Supreme Court is currently considering when the right to appointed counsel arises under section 1170.95, subdivision (c), and whether trial courts may consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under section 1170.95. (*People v. Lewis*, *supra*, S260598.)

relief for persons convicted of attempted murder. Therefore, the trial court properly denied the petition without appointing counsel because Perez was ineligible as a matter of law.[6]

Perez makes several arguments aimed at circumventing this result. He contends that the plain, mandatory language of section 1170.95 required only a single prima facie showing, with counsel to be appointed as soon as he requested it. As we recently explained in *Tarkington*, this interpretation of section 1170.95 is incorrect. (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 897–899, 900–904; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 328–329, 332–333, rev.gr.; *People v. Drayton*, *supra*, 47 Cal.App.5th at pp. 975–976.) Section 1170.95 requires that the court "make two distinct determinations on a resentencing petition: one regarding eligibility (whether the petitioner 'falls within the provisions of this section'), and the second regarding entitlement (whether petitioner has made a prima facie showing he or she is 'entitled to relief'). The Legislature's use of these different phrases mandates this conclusion. ' "Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning." ' [Citations.]" (*Tarkington*, *supra*, 49 Cal.App.5th at p. 902.) Contrary to

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[6] Perez complains that there is no indication the trial court reviewed the record to determine his ineligibility. But the court did not have to look far: the petition itself stated Perez was convicted of attempted murder, and Perez does not dispute the petition's accuracy in this respect. For confirmation—if any was needed—the court had to look no further than this court's opinion in Perez's direct appeal.

Perez's contention, the legislative history of the bill supports this interpretation. (*Tarkington*, *supra*, at pp. 902–904; *Verdugo*, at pp. 330–331.)

Second, Perez asserts that he had a Sixth Amendment right to counsel as soon as he requested it because the section 1170.95 petitioning procedure is a critical stage of a criminal proceeding. This is so, he avers, because of the "adversarial nature" of the proceedings.

Under both the state and federal constitutions, a defendant has a right to counsel at all critical stages of the proceedings. (U.S. Const., 6th Amend.; Cal. Const., art I, § 15; *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1004–1005 (*Gardner*); *People v. Doolin* (2009) 45 Cal.4th 390, 453; *People v. Rouse* (2016) 245 Cal.App.4th 292, 296–297 (*Rouse*).) Critical stages are those "events or proceedings in which the accused is brought in confrontation with the state, where potential substantial prejudice to the accused's rights inheres in the confrontation, and where counsel's assistance can help to avoid that prejudice." (*Gardner*, at pp. 1004–1005; *Rouse,* at p. 297 [" ' "[T]he essence of a 'critical stage' is . . . the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel." ' "].) Thus, arraignments, preliminary hearings, postindictment lineups and interrogations, plea negotiations, and sentencing are all critical stages. (*Gardner*, at p. 1005; *Rouse*, at p. 297.)

Some examples are instructive. In the context of Proposition 47, the Safe Neighborhoods and Schools Act, once a defendant has "passed the eligibility stage" and has been found eligible for resentencing, he or she has the right to counsel; such

a proceeding is "akin to a plenary sentencing hearing" and is therefore a critical stage of the proceeding. (*Rouse*, *supra*, 245 Cal.App.4th at p. 299.) Where a threshold eligibility determination under Proposition 47 turns on a disputed factual issue—i.e., the value of stolen property—a defendant has a Sixth Amendment right to be present. (*People v. Simms* (2018) 23 Cal.App.5th 987, 996–998.) And, in a somewhat different context, it has been held that a defendant is entitled, as a matter of fairness, to be present with counsel when, on remand, a trial court exercises its discretion whether to strike enhancements in light of statutory amendments. (*People v. Rocha* (2019) 32 Cal.App.5th 352, 359.) On the other hand, the "threshold issue of eligibility for relief" under Proposition 47's resentencing provision may often be "determined as a matter of law from the uncontested allegations of the petition or from the record of conviction," and a defendant has no Sixth Amendment right to be personally present to address purely legal questions. (*People v. Simms*, at pp. 993, 998.)

Considering the foregoing, it is clear the first, prebriefing prima facie review under section 1170.95 is not a critical stage of the proceedings. At that point, the court is simply tasked with determining whether there is a prima facie showing the petitioner falls within the provisions of the statute as a matter of law, making all factual inferences in his or her favor. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329, rev.gr.; *Tarkington*, *supra*, 49 Cal.App.5th at p. 898.) This initial prima facie review is not an adversarial proceeding. It is not akin to a sentencing hearing. The court does not rule on disputed issues of fact; it must make all factual inferences in favor of the petitioner. (*Verdugo*, at

p. 329; *Tarkington*, at p. 898.) And, the court is not called upon to exercise its discretion in any respect.

Nor do we detect any possibility that counsel's absence could prejudice a petitioner in a significant way, or that counsel's presence at this stage is necessary to preserve his or her rights. The instant case provides an apt illustration of why this is so. The court's ruling turned on one simple, easily ascertainable, and undisputed fact: the nature of Perez's conviction. It is unclear how appointed counsel could have assisted Perez in any meaningful way. Perez is ineligible as a matter of law, pure and simple; counsel's representation could have done nothing to change that fact.

Perez asserts that due process requires that an incarcerated defendant must be afforded the right to counsel in various instances even where the Sixth Amendment does not. (*People v. Rouse*, *supra*, 245 Cal.App.4th at p. 300.) Perez points to language in *Rouse* reiterating that "if a postconviction petition by an incarcerated defendant 'attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns.' [Citations.]" (*Id.* at p. 300, quoting *In re Clark* (1993) 5 Cal.4th 750, 780.) But, Perez has not moved past the initial eligibility stage; he has not made a prima facie case requiring issuance of an order to show cause. Indeed, if he had, the terms of section 1170.95 would require appointment of counsel. *Rouse* does not otherwise assist Perez; the court expressly did not reach the question of whether the right to counsel attached at the eligibility phase of a Proposition 47 proceeding. (*Rouse*, at p. 301.)

In sum, the trial court properly denied the petition without appointing counsel for Perez.[7]

DISPOSITION

The order denying Perez's petition for resentencing pursuant to section 1170.95 is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

I concur:

EGERTON, J.

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[7] In light of our conclusion, we need not address the People's arguments that any error in failing to appoint counsel and summarily denying the petition was harmless or that Perez was ineligible on additional grounds.

LAVIN, J., Concurring:

For the reasons laid out in my dissent in *People v. Tarkington* (2020) 49 Cal.App.5th 892, I disagree that a trial court may summarily deny a statutorily-compliant resentencing petition under Penal Code section 1170.95 (Section 1170.95) without appointing counsel.

In his resentencing petition, however, Antonio Perez states that he had been convicted of attempted murder. And on appeal, Perez reiterates that he was convicted of attempted murder, not murder. Because defendants convicted of attempted murder are ineligible for resentencing under Section 1170.95, I agree that the court's order should be affirmed.

LAVIN, J.